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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1141

MIGUEL ANGEL MORA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

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The Petitioner MIGUEL ANGEL MORA respectfully prays that a writ of certiorari issue to review the judgment of the Florida District Court of Appeal, First District, entered in this proceeding on February 23, 1979.

OPINION BELOW

The two-sentence opinion of the Florida District Court of Appeal, a summary affirmance, is not reported.

The result, an affirmance of the trial court, is reported as *Mora v. State,* 368 So.2d 1377 (Fla. 1st DCA 1979) ("Florida Decisions Without Published Opinions"). The opinion is reproduced in the Appendix, at page 1a. The opinion of the trial court (the Circuit Court of the Second Judicial Circuit for Leon County, Florida) was not published, and it, too, appears in the Appendix, at page 6a.

JURISDICTION

The judgment of the Florida District Court of Appeal, First District, was entered on February 23, 1979, and a timely petition for rehearing was denied on March 21, 1979. Thereafter, on October 25, 1979, the Supreme Court of Florida, acting on a timely petition, declined to exercise its authority to review by certiorari the decision below. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether the search of the Petitioner's suitcase at the Tallahassee Municipal Airport on January 29, 1978, was in violation of the Petitioner's protection against unreasonable searches and seizures as guaranteed by the fourth and fourteenth amendments to the United States Constitution, thus requiring the suppression of the use, in subsequent criminal prosecution of the Petitioner, of evidence gained as a result of that search.[1]

[1] Throughout this proceeding, the parties have principally addressed one, seemingly controlling, subsidiary question: Was there police involvement in the warrantless search that led to the Petitioner's arrest and prosecution, so as to render that search governmental and thus within the scope of protection afforded by the fourth and fourteenth amendments to the United States Constitution? The sole argument of the state in the court below was that the search was not "governmental."

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE[2]

On a Sunday morning in January, 1978, Petitioner MIGUEL ANGEL MORA arrived at the Tallahassee [Florida] Municipal Airport on an Eastern Airline flight that had

[2] Because the lower court did not enter an opinion setting forth the facts, the Petitioner has reconstructed the relevant factual situation with some depth. Throughout these appellate proceedings, the Respondent State of Florida has accepted the Petitioner's statement of the case and facts. *See* Respondent's Jurisdictional Brief at 2, *Mora v. Florida,* No. 56,645 (Fla. Oct. 25, 1979); Brief

[footnote continued]

originated in Miami, Florida, where he had "checked" his suitcase with the airline. Amid the clothing in his suitcase were two plastic sandwich-bags, one containing some capsules of methaqualone and phenobarbitone and the other a few grams of marijuana (R. 8, Lines 14-16), his possession of which was unlawful under Florida law. (R. 1).

After disembarking, the Petitioner learned that his suitcase had failed to accompany him. He reported the loss and described his zippered, brown leather suitcase to Eastern Airline employees, who then put out a "tracer" notice in an attempt to find the lost suitcase. The Petitioner went to his home in Tallahassee and waited.

Later that day, he telephoned the Eastern desk, seeking information on the location of his luggage. (R. 38, Lines 3-4). Late in the afternoon, the suitcase arrived at the airport. According to Eastern employees, the baggage-check identification number had been removed. (R. 37, 56). Having obtained from the Petitioner a description of his clothing in the suitcase, the Eastern employees determined to open it, ostensibly to make certain that it belonged to him. (R. 51).[3]

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of Appellee at 2, *Mora v. Florida*, No. KK-409 (Fla. 1st DCA Feb. 23, 1979). It is recognized that this Court will "make its own independent examination of the record" in deciding whether the decision of the lower court deprives the Petitioner of his rights as secured by the Constitution. *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959).

[3]Another and quite different reason for this—the initial opening of the suitcase—is reflected in statements made by the Eastern employees to Tallahassee police officers. Officer Gurney Smith spoke with Eastern employee Doug Adams shortly after the suitcase was first opened: "My understanding of the reasoning I think was when he came around to advise me in this matter, that this—Mr. Mora, I believe—had been more or less harrassing them all during that day of calling them in regards to has his bag come

[footnote continued]

It was Eastern Airline employee Doug Adams who initially opened the suitcase. (R. 35). While searching the Petitioner's bag, Adams found the two plastic sandwich-bags underneath some clothing inside the suitcase. (R. 39, Lines 7-8; R. 69, Line 1). Adams closed the suitcase and left it to obtain the assistance of the Tallahassee police officer who was on duty at the airport, Officer Gurney Smith.

Doug Adams told Officer Smith that he "thought" that he had discovered a suitcase "that contained some type of drugs . . . ." (R. 22, Lines 17-19). Officer Smith thereupon asked Adams to show him the contents of the suitcase. (R. 42; R. 28, Lines 22-24). Officer Smith was taken to the Eastern Airline office, where "the suitcase was laying on the table." (R. 22, Line 23). Pursuant to Officer Smith's request (R. 28, Lines 22-24; R. 42, Lines 1-2), Mr. Adams "laid the top back" (R. 22, Lines 23-24) and then moved aside some sweaters—which the Petitioner had previously described as being in his suitcase—to show the police officer the two sandwich bags: "After he moved the sweaters is when I saw the stuff." (R. 28, Lines 10-11).

But Officer Smith could not identify the contents of either of the plastic bags. (R. 39, Lines 15-19; R. 36, Lines 2-9). He needed to call a "vice squad officer" to determine whether they contained contraband. (R. 42, Lines 7-11).

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in. And they just more or less became kind of suspicious of why he was so concerned about the bag." (R. 26, Lines 13-18). Officer Richard Huffman arrived on the scene some time later, and he was apparently told the same thing: "Mr. Mora had further contacted them several more times. He seemed to be upset; . . . . He just wanted to get the bag as soon as possible, and he'd like to know what the problem was. Because this happened several different times and because Mr. Mora was very short with them over the phone . . . they began to wonder a little bit about that bag." (R. 80, Lines 12-20).

But—even before Officer Smith was called—Eastern Airline employees had long-since established that the Petitioner was the owner of the suitcase: The sweaters that he had described were indeed in the suitcase, covering the suspicious "baggies." Eastern's business was finished, so they carefully repacked the suitcase, just as it was before they had ever opened it. (R. 40, Lines 6-8; R. 54, Lines 14-17). While Officer Smith watched, Doug Adams zipped the suitcase closed (R. 27, Lines 12-14) and moved it to another room. (R. 16, Lines 12-14).

So Officer Smith called the Tallahassee Police Department to turn the matter over to an experienced "vice officer." (R. 25, Lines 19-25; R. 30, Lines 20-23). But the one vice officer who was on duty could not be reached. (R. 23, Lines 4-9). Instead, it was Patrolman Richard Huffman of the Tallahassee Police Department who was dispatched to the airport. (R. 79, Line 13).

When Officer Huffman arrived, Officer Smith met him and told him that "Eastern Airlines officials had a suitcase that they suspected of having illegal drugs in it." (R. 88, Lines 1-3). Upon learning that his call involved suspected "illegal drugs," Officer Huffman, too, "called the vice section of the police department" and "found out that there wasn't anybody else on call in vice that could come out and handle it." (R. 79, Lines 23-25). So, Officer Huffman went to the Eastern Airline office. The Petitioner's suitcase was there, still closed. (R. 88, Lines 4-8; R. 30, Lines 3-6).

At this point, the Petitioner remained unaware that his suitcase had arrived. He was not at the airport. (R. 43, Lines 22-24). And although the airline employees could have held the suitcase for "an hour or two" while a warrant was obtained (R. 43, Lines 17-19), they were

not asked to do so. (R. 43, Lines 10-13). At no point was there an attempt to obtain a search warrant. (R. 43, Lines 10-13). Instead, Officer Huffman asked Eastern's Doug Adams to open the Petitioner's suitcase and to show him the suspicious items. (R. 85, Lines 16-18; R. 29, Lines 13-17; R. 14, Lines 16-23). In response, Adams unzipped (R. 88, Lines 7-9) and opened the bag "for him." (R. 14, Lines 16-17). "He asked to look at the contents of the bag, and I just opened the bag and he made his examination." (R. 40, Lines 2-3).

The plastic bags were still "in the back of the bag underneath the coat." (R. 39, Lines 7-8). Eastern's Doug Adams testified as follows:

Q. So then Officer Huffman lifted up the coat and saw the drugs there?

A. Right.

Q. Okay.

A. Well, he just moved it aside. [R. 40, Lines 10-14].

Officer Huffman testified that "underneath some of the clothing" he found "a small plastic bag, clear bag, containing a small amount of brown, grassy substance" which he "tentatively considered" to be marijuana. (R. 81, Lines 10-13). Nearby, he found a plastic bag containing what he described as "40 to 50 pills that were blue and green ones and four or five yellow pills." (R. 81, Lines 14-16). Officer Huffman once again called the vice section of the Tallahassee Police Department in hopes that someone familiar with narcotics would come out to the airport and identify the substances. But this was to no avail. (R. 86).

At this point, Officer Huffman decided to arrest the Petitioner: "We . . . decided that we would go ahead and call Mr. Mora up . . . and he could come and pick it up."

(R. 81, Lines 17-20). An Eastern employee notified the Petitioner that his suitcase had arrived. (R. 60, Lines 15-18). When the Petitioner arrived at the airport, he identified the suitcase as his and was placed under arrest by Officer Huffman for "a possible drug violation." (R. 82, Lines 3-15).

A FEDERAL QUESTION WAS AND IS PRESENTED

As a result of the airport searches, the Petitioner was charged by the Respondent State of Florida with the commission of three counts of possession of controlled substances, two felonies and one misdemeanor. (R. 1-2). He initially plead not guilty to the charges (R. 3-4), and pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, he filed a timely Motion to Suppress the evidence obtained as a result of the search. In that Motion, the Petitioner specifically invoked his "rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution." (R. 74). On May 22, 1978, the trial court conducted a hearing on that Motion to Suppress, where the Petitioner and the State stipulated that the Petitioner's Motion would be determined solely upon depositions which had previously been taken. (R. 115, 117, 118). The trial court heard no testimony nor considered any evidence—other than those depositions—in connection with the Motion.

Several days later, the trial judge orally announced a decision to deny the Motion to Suppress Evidence, although the written Order to that effect was not rendered until June 2, 1978. (R. 95). As a result of the denial of that Motion, the Petitioner entered his negotiated plea of nolo contendere to one of the three counts against him, expressly and specifically reserving his right, pursuant to Rule 3.172(c)(iv), Florida Rules of Criminal Procedure, to appeal the trial court's ruling

denying the Motion to Suppress Evidence. (R. 106). The sentence imposed (R. 101) has been stayed by the trial court pending the outcome of these proceedings.

Subsequent to the imposition of sentence, the Petitioner filed a notice of appeal, timely invoking the jurisdiction of the lower court, the Florida District Court of Appeal, First District. (R. 99). The Petitioner appealed the trial court's refusal to suppress the evidence, again contending that it had been obtained as a result of an unreasonable search and seizure in contravention of the fourth and fourteenth amendments to the United States Constitution. The depositions upon which the trial court ruling was based form the bulk of the record below. (R. 11-73, 76-92).

The lower court, on February 23, 1979, affirmed the action of the trial court, and on March 21, 1979, denied a timely Petition for Rehearing. Appendix, page 3a. The Petitioner then timely sought review in the Supreme Court of Florida, but on October 25, 1979, that court, also without opinion, declined to exercise its discretionary jurisdiction to make such a review. Appendix, page 4a. This Petition was filed within ninety days of that denial.

REASONS FOR GRANTING THE WRIT

No opinion was issued below, but the facts upon which the Motion to Suppress was denied are available in the record and are not disputed. The necessary and dispositive subsidiary question is whether or not there was sufficient police involvement in the search of the Petitioner's suitcase so as to render that search subject to the restrictions of the fourth amendment to the United States Constitution, as made applicable to the

states by the fourteenth amendment.[4] Because there are no exceptions to the fourth-amendment warrant requirement even arguably available to render the search constitutionally "reasonable,"[5] the lower court, like the trial court, must have adopted the Respondent's sole position through these proceedings: "the Fourth Amendment is not applicable in the case sub judice." Brief of Appellee at 2, *Mora v. Florida*, No. KK-409 (Fla. 1st DCA Feb. 23, 1979). The lower court found that the fourth amendment was not implicated in Officer Huffman's[6] search of the suitcase and that, therefore, there was no search warrant required.

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[4]The fourth amendment has been made fully applicable to the states by the fourteenth amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949). In this Petition, reference is made to the fourth amendment as it applies to the State of Florida.

[5]A warrantless search, if subject to the fourth amendment, is "*per se* unreasonable." *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions to the warrant requirement are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), so as to require two things: (1) probable cause, and (2) exigent circumstances. *E.g., Vale v. Louisiana*, 399 U.S. 30 (1970). In this case, there was neither: Officer Huffman did not have probable cause when he asked that the suitcase be opened. All he knew was that unidentified Eastern employees "had a suitcase that they suspected of having illegal drugs in it." (R. 88, Lines 1-3).

Moreover, it cannot realistically be asserted that "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948). The record establishes the contrary: The suitcase *could* have been held for the police officers while a search warrant was obtained. The Petitioner was *not* at the airport to claim the suitcase; he was not even aware that his suitcase had arrived, until Officer Huffman "agreed" that he should be so informed. (R. 43; R. 81, Lines 17-22).

[6]It is clear from the record that the Petitioner was arrested and charged, and that the evidence was seized, as a result of what Officer Huffman saw in his (the third) search of the Petitioner's suitcase. (R. 81, Lines 10-13). Officer Smith, the first officer to view the contraband, did not know what it was. And all that

[footnote continued]

I.

THE DECISION BELOW IS NOT IN ACCORD WITH THE DECISIONS OF THIS COURT AS TO THE DEGREE OF GOVERNMENTAL PARTICIPATION SUFFICIENT TO RENDER A SEARCH SUBJECT TO CONSTITUTIONAL RESTRAINT.

This case involves more than one search.[7] From the outset the Petitioner has conceded (R. 127) that the first search, "the original opening," (R. 95) was outside the scope of protection afforded by the fourth amendment and thus by the exclusionary rule. As the trial court correctly found:

> The *original* opening . . . .
>
> . . . was done by private citizens not acting as agents of the police. [Appendix, page 6a (emphasis added)].

But in deciding that the subsequent openings—done at police request and for police purposes—were beyond the protection of the fourth amendment,[8] the lower court

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Smith told the arresting Officer Huffman *before* Huffman's search was that "Eastern Airlines officials had a suitcase that they suspected of having illegal drugs in it." (R. 87-88). Regardless, Officer Smith's view was unlawfully obtained for the same reasons as was Officer Huffman's subsequent examination. The suitcase was opened and clothing moved aside for Officer Smith's benefit and at his request, after the airline employees had identified its owner. (R. 22, Lines 17-19; R. 23-24; R. 28, Lines 22-24; R. 29, Lines 10-12; R. 42).

[7]This fact is recognized in the trial court's order, where the first three of that court's four findings were directed to the "original opening of the Defendant's suitcase." *See* Appendix, page 6a.

[8]*See Arkansas v. Sanders*, 99 S.Ct. 2586, 2592 (1979) (citations omitted):

> A lawful search of luggage generally may be performed only pursuant to a warrant. [L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy.

deviated from principles of federal constitutional law most clearly and specifically enunciated by this Court in *Lustig v. United States,* 338 U.S. 74 (1949).

It was in *Burdeau v. McDowell,* 256 U.S. 465 (1921), however, that this Court set forth the most general proposition that "The Fourth Amendment . . . applies to *governmental* action." 256 U.S. at 475 (emphasis added). In *Burdeau,* papers were stolen and turned over to federal prosecutors. The Court concluded that "there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure," because

> . . . no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . . .

Id. at 475. But there was no attempt in *Burdeau* to state, in general terms, the extent to which police involvement in a search will be tolerated before the search becomes subject to constitutional restraints.

It was not until the decision of this Court in *Lustig* that these general principles were set forth. After thirty years, *Lustig* continues to be recognized as "the leading case in this area" of the law of search and seizure. *United States v. Mekjian,* 505 F.2d 1320, 1327 (5th Cir. 1975).

The principles enunciated in *Lustig* apply to this and similar cases by analogy: *Lustig* involved the old "silver platter" doctrine, which allowed the use in federal court of evidence improperly seized by any person who was not a *federal* officer. The *Lustig* decision defines the extent to which federal officers can become involved in a search, without that search becoming—for fourth-amendment purposes—a federal search. In this connection, the

United States Court of Appeals, Fifth Circuit, has observed:

> Although the "silver platter" doctrine allowing fruits of illegal state searches to be freely received in the federal courts has now been abrogated, that former rule has its analogue in the law governing searches conducted by private individuals.

Id. at 1327-28 (citations omitted).

The general principles enunciated in *Lustig* were flatly contradicted by the action of the lower court.[9] The facts of *Lustig* make that contradiction most glaring: Local police officers in that case (analogous to private persons) conducted a warrantless search of Lustig's hotel room, with the permission of the hotel manager. They had their own, non-federal reasons for the search—they were seeking evidence of violations of state law. During their search, however, the state officers found evidence indicating possible counterfeiting of currency, a federal crime. They called federal agent Greene.

The Court found that "Greene did not request the search, that . . . he was not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law." 338 U.S. at 78. The "state officers preceded Greene in illegally rummaging through the bags and bureau drawers . . . ."

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[9]The deviation of the lower court and of some other appellate courts from the principles enunciated in *Lustig* can perhaps be partially explained by the fact that this Court has not, since that 1949 decision, reasserted and applied those principles to a case such as the one at bar. *Cf. Coolidge v. New Hampshire,* 403 U.S. 443, 487 (1971) (the fourth amendment applies if the private party, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state . . . .") (plurality opinion) (citations omitted).

Id. at 79. Greene did not play a role, the Court observed, in the physical process of the search, but he did in the "functional" process:

> He was an expert in counterfeiting matters and had a vital share in sifting the evidence . . . . He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting.

Id. On these facts, the Court concluded that Greene participated to an extent sufficient to call into play the fourth amendment:

> But search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense. Greene's selection of the evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction in Room 402, was not severable, and therefore was part of the search carried on in that room. [A]lthough he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded.

Id. at 78. So, too, in this case, airline officials first entered the suitcase for purposes other than assisting Officer Huffman in garnering evidence. Completing their search, and after reclosing the suitcase, the airline employees informed the police of the presence of suspicious materials in the Petitioner's suitcase. Yet, unlike agent Greene in *Lustig*, the officers in the instant case went so far as to *request* another invasion of Petitioner's suitcase. Like agent Greene, the police officers were the "experts": like him, they conducted "the critical examination of the uncovered articles." *Id.* The search was

not completed until the officers became involved and made the determination that there was evidence present for use in a state prosecution.

The *Lustig* decision set forth this basic principle:

> The decisive factor . . . [making a search governmental] is the actuality of a share by a federal officer in the total enterprise of securing and selecting evidence. . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.

338 U.S. at 79. Officer Huffman surely had "a share in the total enterprise" that led to his viewing, and his identification as evidence, of the alleged contraband. The decision of the lower court contradicts that of this Court in *Lustig*.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SOME UNITED STATES COURTS OF APPEAL ON THE SAME QUESTION.

A. The decision of the court below conflicts with that of the United States Court of Appeals, Seventh Circuit, reported at *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975).

The Court of Appeals, in *United States v. Newton*, reversed a trial-court denial of a motion to suppress evidence that was seized in an airport/luggage search. The Defendant Newton, like the Petitioner in the instant case, suffered the in-flight loss of her luggage. The airline employees were suspicious of Newton, and they initially opened her suitcase in the presence of govern-

ment agents. Like agent Greene in *Lustig*, the agent in *Newton*, upon having the suitcase opened in his presence, determined that it contained contraband. The court concluded:

> There was not a "hands-off" participation by the federal agents.
>
> In the first place, the airline employees did not need to search the luggage to find out to whom it belonged. They already knew. There was only one reason why they initially notified the DEA and subsequently took the federal agents into their confidence; that was to determine whether the bag contained narcotics and, if so, to turn it over to the agents for their investigative activities. That the agents came prepared to participate in the immediate investigation is without dispute. . . . Under all of these circumstances we feel compelled to reach the conclusion that this was a government search requiring the application of the Fourth Amendment.

510 F.2d at 1153. When the airline employees in the instant case reopened the Petitioner's suitcase, they, too, already knew to whom it belonged. They probably knew that before they first lifted his sweaters, inside of the suitcase, to get their first, private look at the contraband. But the only reason for opening the Petitioner's suitcase the second and third time was to assist police officers in their investigation. Indeed, the suitcase was opened at the officers' request. Yet, the court below necessarily found the fourth amendment did not apply to the search of the Petitioner's suitcase, and in so doing it is in conflict with the decision at *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975).

B. The decision below conflicts with that of the United States Court of Appeals, Ninth Circuit, reported at *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

The Court of Appeals, in *Corngold v. United States*, reversed a trial-court denial of a motion to suppress evidence that was seized in an airport search. In *Corngold*, airline agents opened a package, allegedly pursuant to a right of inspection reserved in its contract of carriage. But the TWA employees opened the package in response to government requests, as did the Eastern employees in the instant case. The court held, "The fruits of a search conducted solely in aid of the enforcement of a federal statute, as this one was, are inadmissible when the search fails to meet Fourth Amendment standards." 367 F.2d at 5 (citations omitted).

The court in *Corngold* stated precisely the procedure that should have been followed in the instant case:

> We would of course agree that if a carrier, while inspecting packages for its own purposes pursuant to a provision in the contract of carriage, discovers contraband and notifies the customs agents of that fact, *and the agents then secure a warrant* on the basis of this information and conduct a search, the search is entirely proper. This is precisely the procedure which the Fourth Amendment contemplates.

367 F.2d at 6 (emphasis added). The police officers in the instant case did not comply with this "procedure which the Fourth Amendment contemplates." *Id.* Thus, the decision of the lower court conflicts with that in *Corngold v. United States.*

C. The decision below conflicts with that of the United States Court of Appeals, Sixth Circuit, reported at *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972).

Cash v. Williams involved the search of an automobile held by a wrecker operator, Mr. Rainey, in his garage. After towing the vehicle to his garage, he began searching it for the purpose of finding evidence of ownership, that he might know whom to bill for the towing charges. In the course of that search, he found a "brownish grassy substance" which he was unable to identify. 455 F.2d at 1229. Rainey returned the substance to the automobile, and law enforcement officers were summoned.

Without obtaining a search warrant, the officers confirmed the presence of marijuana in the automobile. At the outset, the Court of Appeals first recognized, as has this Petitioner, that "a search by a private citizen not acting in concert with or at the direction of the police is not a violation of the fourth amendment's prohibition of unreasonable searches." *Id.* at 1230 (citations omitted). But the *Cash* court held that "the subsequent searches by government officers must be independently tested against constitutional criteria." *Id.*[10]

Like the Eastern employees in the instant case, Rainey did not turn over the evidence that he found to the police. He merely "tipped them off" as to its location. Thus, the court in *Cash* observed that

> Rainey is best characterized not as a citizen who has furnished the government with evidence which he has seized, but as an informer who has come upon information which he feels should be revealed to the proper law enforcement officials.

[10] *Contra, United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978), *cert. denied* 99 S.Ct. 1022 (1979); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973).

Id. (citations omitted). The court concluded that the search by the police officers, who were acting upon Rainey's information, had to be measured against fourth amendment standards.[11] The officers in that case not having obtained a warrant, and there being no justification in the record for a warrantless search, the *Cash* court concluded that the evidence seized in that search was inadmissible and that the motion to suppress was improperly denied.

The decision of the court below squarely contradicts that of the court in *Cash v. Williams*. In the instant case, the officers did not have the evidence handed over to them "on a silver platter" by Eastern employees, but instead they were "tipped off" to the presence of a suspicious substance in the suitcase. Just as the officers in the *Cash* case failed to have a magistrate determine whether they had probable cause before they re-entered the automobile, the officers in the instant case failed to take their "tip" to a magistrate for appraisal before having the Petitioner's suitcase reopened and searched.[12]

III.

THE DECISION OF THE LOWER COURT PASSES UPON A SUBSTANTIAL AND UNSETTLED QUESTION OF FEDERAL LAW.

As has already been illustrated, the decision of the lower court conflicts with the principles of *Lustig v. United States*, 338 U.S. 74 (1949). As such, and given

[11] *Cf. Lustig v. United States*, 338 U.S. at 78-79 ("it is not a search by a federal official if evidence secured by state authorities is *turned over* to the federal authorities on a silver platter.") (emphasis added).

[12] *See also United States v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979) (police called by carrier to investigate contraband not required to obtain warrant where package was still open and contraband in plain view).

the facts of this case, the lower court decision joins a line of cases emanating from the United States Court of Appeals, Fifth Circuit, that likewise conflict with the principles of *Lustig* and with the other federal appellate decisions discussed above. That line of cases not only acts to unsettle this aspect of the law of search and seizure. Its basic proposition threatens the privacy clearly intended for protection by the fourth amendment. Its continued application will undermine that necessary trust by which one must permit limited, private intrusions. This case provides the Court with an opportunity to overrule bad law.

In *United States v. Blanton,* 479 F.2d 327 (5th Cir. 1973), airline employees opened an unclaimed suitcase in order to determine its ownership. They found suspected contraband, and law enforcement officials were notified. The bag was then closed by an airline employee. When the law-enforcement officer arrived, the airline employees in *Blanton* turned the bag over to him. He thereupon opened it, observed the contraband, and arrested Blanton. As in the instant case, it was conceded that the original search by the airline employees was outside the protection of the fourth amendment. "The argument is that the federal officer made a new search under circumstances where a warrant could have been obtained." *Id.* at 328. The *Blanton* court decided that "whether the bag was left open . . . or reopened by the police" was "happenstance" and "insufficient to convert an otherwise private search into an unreasonable official search in the immediate circumstances . . . which are present . . . ." *Id.*[13] Thus, the officers' opening of the suitcase, according to *Blanton,* "did not constitute a separate or additional search" to that initially made by private persons. *Id.* The *Blanton* court insisted that the case could "be distinguished from cases where the officers participate in or are in league with the private person in making the initial search." *Id.* at 329 (citation omitted).

[13]The *Blanton* case can be distinguished, on its facts, from the instant case. In *Blanton,* "the bag was turned over to the federal officers." In the instant case, however, the officers were not examining evidence turned over to them, but were instead responding to an informant's "tip" that there was suspicious material in the Petitioner's suitcase. *Cf. United States v. McDaniel,* 574 F.2d 1224, 1227 (5th Cir. 1978) ("Since the airline voluntarily *released the briefcase to the Government,* this case is controlled by our decision in *Blanton.* The district court correctly denied the motion to suppress.") (emphasis added), *cert. denied* 99 S.Ct. 2181 (1979) ("Mr. Justice BRENNAN and Mr. Justice WHITE would grant certiorari.").

[footnote continued]

Thus, on the question of whether the officer in *Blanton* should have sought a search warrant, the fifth circuit court decided that he did not conduct "a separate search." Yet, on the controlling question of whether or not the search was governmental, the *Blanton* court would seek to distinguish its case "from cases where the officers participate." The *Blanton* court, as a rationale to uphold the search in that case, found that the government's own search was not "separate" from the first search, and, at the same time, found that the government did not participate in the first search.

The fifth circuit court's decision in *Blanton* was elevated to a principle in *United States v. Bomengo,* 580 F.2d 173 (5th Cir. 1978), *cert. denied* 99 S.Ct. 1022 (1979):

> We have long recognized that a police view subsequent to a search conducted by private citizens does not constitute a "search" within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.

Id. at 175. Thus *Bomengo* extended *Blanton* to a search of a private residence, when preceded by a landlord's initial entry.[14]

The principle enunciated by the fifth circuit in *Blanton* and *Bomengo*, a principle apparently followed by the lower court in this case, is an extremely dangerous one. First, it does not consider the right or the authority of the private person to make the initial search: Under *Blanton-Bomengo* a police officer could, without a warrant, retrace the steps of a burglar-turned-informant, without conducting a "separate" or "governmental" search subject to the fourth amendment's reasonableness requirement. But if the *Blanton-Bomengo* rule *did* turn on the propriety of the initial, private search, would inquiry then need to be made into the purpose or state of mind of the inspecting landlord or hotel clerk? Would this case need to be remanded for findings of "fact" in that regard? Even if the *Blanton-Bomengo* rule was so limited, it undermines well-established law to the effect that one who confers a right to inspect or enter an area, without conferring an equal right to the use or enjoyment of that area, does not authorize the other to consent on his behalf to a warrantless search by law

---

[14] *But cf. Stoner v. California*, 376 U.S. 483, 489-90 (1964), where this Court ordered the suppression of evidence found in a hotel room by law enforcement officers admitted by a hotel clerk:

> In a closely analogous situation the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purposes, such as to "view waste." Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828. The Court pointed out that the officers' purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenants' homes secure only in the discretion of their landlords.

enforcement authorities. Before "consenting" to a government search, the third person would only need to intrude before the police: The police could then follow and repeat the intrusion without probable cause, without exigent circumstances, and without a search warrant. The *Blanton-Bomengo* doctrine, in effect, allows police searches at the unfettered discretion of landlords, hotel clerks, exterminators, telephone repairmen, plumbers, and anyone else who is entrusted with access, for a limited purpose, to areas that are otherwise private. Under that doctrine it is they, not the neutral magistrate acting upon their "tip," who can authorize a governmental search. And the

> constitutional protection against unreasonable searches and seizures . . . would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.

Stoner v. California, 376 U.S. 483, 490 (1964) (citations omitted). The Court has, in this case, an opportunity to reject the *Blanton-Bomengo* rationale and to put a halt to continued state reliance upon its dangerous non sequitur. The Court should take this opportunity "so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [the fourth amendment], by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255 U.S. 298, 304 (1921).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Florida District Court of Appeal, First District.

Respectfully submitted,

MURRAY M. WADSWORTH and
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Counsel for Petitioner

January 23, 1980

APPENDIX

APPENDIX A

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. KK-409

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

MIGUEL ANGEL MORA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed February 23, 1979.

An Appeal from the Circuit Court for Leon County. John A. Rudd, Judge.

Murray M. Wadsworth and William H. Davis of Thompson, Wadsworth, Messer, Turner & Rhodes, for Appellant.

Robert L. Shevin, Attorney General; Charles A. Stampelos, Assistant Attorney General, for Appellee.

PER CURIAM

Upon considering the briefs, the record and oral argument, we find no reversible error.

Accordingly, the judgment appealed from is affirmed. McCORD, Chief Judge, MELVIN and BOOTH, JJ., concur.

APPENDIX B

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. KK-409

MIGUEL ANGEL MORA

v.

STATE OF FLORIDA

ORDER

Petition for Rehearing and Response thereto having been considered,

IT IS ORDERED that the petition is hereby denied.

By Order of the Court dated this 21st day of March, A.D. 1979. Unless otherwise ordered, the Court's mandate will issue fifteen (15) days after this date. Florida Rules of Appellate Procedure, 9.340; General Order entered April 14, 1978. Chief Judge Guyte P. McCord, Jr., Judge Woodrow M. Melvin, and Judge Anne C. Booth.

A TRUE COPY

ATTEST:

/s/ Raymond E. Rhodes
Clerk
District Court of Appeal, First District
Tallahassee, Florida

APPENDIX C

SUPREME COURT OF FLORIDA
FIRST DISTRICT

Thursday, October 25, 1979

Case No. 56,645

District Court of Appeal
KK-409

MIGUEL ANGEL MORA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

ADKINS, Acting C.J., Dissents

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Janie L. Bentley
Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Hon. John A. Rudd, Judge

Murray M. Wadsworth, Esquire
and William H. Davis, Esquire
of Thompson, Wadsworth,
Messer & Rhodes
Charles A. Stampelos, Esquire

APPENDIX D

IN THE
CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 78-83

[Filed: June 2, 1978]

STATE OF FLORIDA,

v.

MIGUEL ANGEL MORA,

Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE coming on for hearing in open court on Defendant's Motion to Suppress Tangible Evidence, and the Court having heard argument of counsel both for the defendant and for the State, and being fully advised in the premises, finds as follows:

1. The original opening of defendant's suitcase was done with his consent and acquiescence.

2. The opening was done by private citizens not acting as agents of the police.

3. The discovery of the contraband inside the defendant's suitcase was legal, and the personnel of Eastern Airlines had an obligation to report the same to law enforcement officials.

4. The law enforcement officers viewing of the contraband was also legal in that they were responding to a complaint from private citizens.

THEREFORE, it is accordingly ORDERED AND ADJUDGED that the defendant's Motion to Suppress be denied.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 2nd day of June, 1978.

/s/ John A. Rudd
Circuit Judge

Supreme Court, U. S.
FILED
APR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1141

MIGUEL ANGEL MORA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

JIM SMITH
Attorney General

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THE CAPITOL
Tallahassee, Florida

Counsel for Respondent

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1141

MIGUEL ANGEL MORA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

Respondent prays that this Court will deny the petition for writ of certiorari heretofore filed seeking review of the opinion rendered by the First District Court of Appeal.

OPINIONS BELOW

On the 2nd day of June, 1978, the

trial court entered an order denying Petitioner's motion to suppress (Pet. App. D). On the 23rd day of February, 1979, the First District Court of Appeal per curiam affirmed Petitioner's judgment and sentence. *Mora v. State*, 368 So.2d 1377 (Fla. 1 DCA 1979) (Pet. App. A). On the 21st day of March, 1979, the First District Court of Appeal denied Petitioner's petition for rehearing (Pet. App. B). On the 25th day of October, 1979, the Supreme Court of Florida denied Petitioner's petition for writ of certiorari (Pet. App. C). The instant petition followed.

JURISDICTION

The jurisdiction of this Court is sought to be invoked by Petitioner under 28 U.S.C. § 1257(3). It is Respondent's position that the issues raised here are not such as should be reviewed by this Court. Petitioner has not presented this Court with a substantial federal constitutional question. Review by writ of certiorari is a matter of sound judicial discretion, and will be granted only where there are special and important reasons therefore. *See* Rule 19, *Rules of the Supreme Court of the United States; Ross v. Moffitt*, 417 U.S. 600 (1974).

QUESTION PRESENTED

Did Petitioner have and/or continue to have a "reasonable" and "legitimate" expectation of privacy when Eastern Airlines Employee Douglas Adams examined the contents of an unidentified bag to determine the ownership thereof, with Petitioner's consent and without any governmental involvement, found contraband within and thereafter summoned Officers Smith and Huffman to examine the contents of the bag?

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Facts except for the following additions. Douglas Adams, an

agent for Eastern Airlines, testified vis-a-vis deposition that his supervisor, Marion Pate, told him to be on the look-out for Petitioner's bag which was reported "missing since 10:00 o'clock that morning." (R 35). The bag came in during the late afternoon but the "tag on the bag did not match the tag on the tracer [they] had initiated." (R 35). Moreover, "there was no identification on the outside of the bag." (R 37). Adams contacted Petitioner and "asked for a list of contents and if he minded if [they] would take a look at the bag to make sure it was his." (R 35). Petitioner gave Adams a list of the contents (R 35, 38). Adams "opened the bag

and found quite a number of pills and a little marijuana in there, plus the items that he had mentioned that were in the bag." (R 35-36, 39). Adams identified the substance contained in one baggie as marijuana (R 35-36, 44-45). Adams summoned Officer Smith of the Tallahassee Police Department *after* Adams found the baggies containing the pills and marijuana (R 36, 39). Moreover, Officer Huffman arrived and conducted his examination *after* Adams found the baggies containing the pills and marijuana (R 39-40, 42). (Deposition of Douglas Adams annexed in Appendix A.)

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner objects to a warrantless "search" of his suitcase at the Tallahassee Airport. It is Respondent's position that the Fourth Amendment is not applicable in the case *sub judice*.

The Fourth Amendment gives protection only against unlawful governmental action. In *Burdeau v. McDowell*, 256 U.S. 456 (1921), this Court said:

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it

> was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Id. at 475.

In defining governmental action, this Court has said:

> So long as he [federal agent] was in it [the search] before the object of the search was completely accomplished, he [federal agent] must be deemed to have participated

> in it [the search].

Lustig v. United States, 338 U.S. 74, 79 (1949). However, "[w]here no official of the federal government has any connection with a wrongful seizure, or any knowledge of it *until after the fact*, the evidence is admissible." (Citations omitted.) *United States v. Mekjian*, 505 F.2d 1320, 1327 (5th Cir. 1975). (Emphasis supplied) This same principle has been announced in *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir. 1977), *cert. denied*, 430 U.S. 959 (1977):

> Thus, if a search is conducted by a private individual, for purely private reasons, it does not fall within the protective ambit of the Fourth Amendment, *United States v. Maxwell*, 5

Cir., 1973, 484 F.2d
1350, 1352.

Id. at 490.

In *State v. Bookout,* 281 So.2d 215 (Fla. 4 DCA 1973), the Court applied the above-stated principles to a factual situation similar to the facts presented *sub judice.* In *Bookout,* an airplane landed at the Orlando terminal and discharged passengers and baggage. All luggage was claimed except one which was inscribed with the initials J.M.H., but had no other visible identification as to the name and address of the owner. Pursuant to a procedure normally followed in attempting to ascertain the name and address of unclaimed luggage, the baggage

service manager for the airline took the suitcase from the baggage claim area, and accompanied by another employee of the airline, proceeded to open the suitcase. Upon opening the suitcase, the airline employee found, *inter alia,* a number of traveler's checks, all with different names on them. Upon making this discovery, the airline employee called the local office of the F.B.I., and this agency, having examined the evidence, called the Orlando Police Department. The following morning, the police were at the air terminal building to inventory the contents of the suitcase. In response thereto, the Court concluded:

In the case before us,
the unlocked suitcase

> had arrived on a flight as personal luggage with *no name or identification* tag on the outside, and had *remained unclaimed* for more than an hour after its arrival at the baggage area. The *luggage was opened in accordance with the airline's policy to promptly ascertain the owner of any luggage which is apparently lost or abandoned.* This is clearly a case of a search by a private individual for a wholly legitimate and proper purpose, and not a search performed for the benefit or with the knowledge of any government official. It has been consistently held that the Fourth Amendment protection against unreasonable searches and seizures applies only in cases involving governmental action, and does not afford protection against searches and seizures made by a

> private individual. . . .

Id. at 216 (Emphasis supplied). *Cf. United States v. McDaniel*, 574 F.2d 1224, 1226-1227 (5th Cir. 1978), *cert.denied*, 99 S.Ct. 2181 (1979); *United States v. Echols*, 477 F.2d 37 (8th Cir. 1973), *cert.denied*, 414 U.S. 825 (1973).

Further, in *Barnes v. United States*, 373 F.2d 517 (5th Cir. 1967), a "search" was conducted by "the owner of a motel in which [the defendant] stayed overnight and in which he left behind a travel case containing the evidence complained of." *Id.* at 518. In *Barnes*, "[t]he search was made on the motel owner's own initiative. Because of it, he became suspicious, called the local police, informed them of

the bag's contents, and made it available to the authorities." The Court concluded:

> The fourth amendment and the case law applying it do not require exclusion of evidence obtained through a search by a private citizen. Rather, the amendment only proscribes governmental action. [Citations omitted.] Clearly the search complained of here did not involve governmental action and was therefore not illegal within the meaning of the fourth amendment.

Id. at 518. *Cf. Berger v. State*, 150 Ga. App. 166, 257 S.E.2d 8 (Ct.App. 1979), *cert.denied*, 26 CrL 4233 (March 17, 1980, U.S.S.C. Case No. 79-854).

Sub judice, Petitioner concedes that the initial examination conducted by the

employees of Eastern Airlines was outside the scope of the protection afforded by the Fourth Amendment. Petitioner's concession finds ample support in the record for Douglas Adams, an agent for Eastern Airlines, testified vis-a-vis deposition, that his supervisor, Marion Pate, told him to be on the lookout for Petitioner's bag which was reported "missing since 10:00 o'clock that morning." (R 35). The bag came in during the late afternoon but the "tag on the bag did not match the tag on the tracer [they] had initiated." (R 35). Moreover, "there was no identification on the outside of the bag." (R 37). Adams contacted Petitioner and "asked for a list of contents and if he minded if [they]

would take a look at the bag to make sure it was his." (R 35). Petitioner gave Adams a list of the contents (R 35, 38). Adams "opened the bag and found quite a number of pills and a little marijuana in there, plus the items that he had mentioned that were in the bag." (R 35-36, 39). Adams identified the substance contained in one baggie as marijuana (R 35-36, 44-45). Adams summoned Officer Smith of the Tallahassee Police Department *after* Adams found the baggies containing the pills and marijuana (R 36, 39). Moreover, Officer Huffman arrived and conducted his examination *after* Adams found the baggies containing the pills and marijuana (R 39-40, 42). (Deposition of Douglas Adams

annexed in Appendix A.)

It is Respondent's position that the examination of Petitioner's bag and discovery of the contraband by Douglas Adams was "completely accomplished" before any governmental action. *Lustig v. United States*, 338 U.S. 74, 79 (1949); *United State v. Sanders*, 592 F.2d 788, 792 (5th Cir. 1979), *cert.granted*, 62 L.Ed.2d 168 (1979); *Blanton v. United States*, 479 F.2d 327, 329 (5th Cir. 1973). The inquiry and examination was conducted on the employee's initiative with the consent of Petitioner and with the intent and purpose to ascertain the true owner(s) of the unidentified bag. *See United States v. Sherwin*, 539 F.2d 1, 6 (9th Cir. 1976)

(*En banc*) n.6; *United States v. Echols*, 477 F.2d 37 (8th Cir. 1973), *cert.denied*, 414 U.S. 825 (1973); *Gold v. United States*, 378 F.2d 588, 591 (9th Cir. 1967); *Barnes v. United States*, 373 F.2d 517, 518 (5th Cir. 1967) n.3.

Further, in *Rakas v. Illinois*, 439 U.S. 128 (1978), this Court stated in part:

> *Katz v United States*, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), provides guidance in defining the scope of the interest protected by the Fourth Amendment. In the course of repudiating the doctrine derived from *Olmstead v United States*, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928), and *Goldman v United States*, 316 US 129, 86 L Ed 1322, 62 S Ct 993 (1942), that

> if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place *but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place*. 389 US, at 353, 19 L Ed 2d 576, 88 S Ct 507; *see United States v Chadwick*, 433 US 1, 7 53 L Ed 2d 538, 97 S Ct 2476 (1977); *United States v White*, 401 US 745, 752, 28 L Ed 2d 453, 91 S Ct 1122 (1971). . . .

Id. at 143 (Emphasis supplied). In *Katz v. United States*, 389 U.S. 347 (1967), Mr. Justice Harlan, in his concurring opinion, stated in part:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable."

Id. at 361.

Petitioner concedes that the initial examination made by Douglas Adams, Eastern Airlines Employee, was outside the scope of the protection afforded by the Fourth Amendment. It must also follow that Petitioner would concede that the Fourth Amendment would not have been implicated had Douglas Adams voluntarily turned the contraband over to the govern-

ment, for surely Petitioner would not quarrel that "it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971). *See* (R 41). Rather, Petitioner argues that the subsequent inquiry and examination made by Officers Smith and Huffman constituted a warrantless search in violation of the Fourth Amendment. In *United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978), *cert.denied*, 439 U.S. 1117 (1979), the Court rejected the argument that for Fourth Amendment purposes a governmental view subsequent to a private search constituted a

new search. The Court stated in part:

> In *United States v. Blanton*, 5 Cir., 1973, 479 F.2d 327, and recently in *United States v. McDaniel, supra, we rejected the argument that for Fourth Amendment purposes a governmental view subsequent to a private search constituted a "new search".* In both cases airline employees opened unidentifiable, unclaimed baggage in an effort to determine ownership. In *Blanton* the defendant's baggage was found to contain a gun with a silencer. In *McDaniel* firearms and narcotics were discovered. *In both cases the bags were resealed and federal officers were notified of the discovery. The officers then reopened the bags.* We held in both cases that the initial search was valid because it was conducted by

> private citizens and that the subsequent view by the officers did not constitute a "separate or additional search", 574 F.2d at 1226; 479 F.2d at 328. *That the officers were required to reopen the baggage in order to inspect the contents was, under the circumstances, of no legal significance.*

Id. at 176 (Emphasis supplied).

Sub judice, Petitioner voluntarily placed his bag in the exclusive care and custody of the airlines. Having done same, Petitioner is charged with the knowledge that a responsible airline official might be required to examine the contents of the bag should the bag, for example, not contain proper identification from

without. In addition, if the airline official is required to examine the contents of an unidentified bag, then, as here, the party claiming ownership, here the Petitioner, assumes the risk that the official, upon finding what he suspects is contraband, will report and/or deliver same to the police. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. White*, 401 U.S. 745, 752 (1971); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

It is Respondent's position that Petitioner did not have a "reasonable" and "legitimate" expectation of privacy when Douglas Adams examined the previously unidentified bag. Moreover, Petitioner did not have a "reasonable" and "legitimate" expectation of privacy when the police officers, who were summoned by Douglas Adams, conducted their subsequent inquiry and examination. What public policy is served if the contraband found inside Petitioner's bag is suppressed? What "official misconduct" does Petitioner wish to deter? The exclusionary rules were fashioned "to prevent, not to repair, and their target is official misconduct." *Coolidge v. New Hampshire, supra*, 403 U.S. at 488. The First District Court of Appeal properly affirmed Petitioner's judgment and sentence.

CONCLUSION

Based upon the foregoing, supported

by the authorities cited in argument and jurisdictional portions of this Brief, Respondent respectfully requests that this Court decline to assume jurisdiction in this case and deny Petitioner's application for issuance of a writ of certiorari.

Respectfully submitted:

JIM SMITH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney
General

CHARLES A. STAMPELOS
Assistant Attorney
General

THE CAPITOL
Tallahassee, FL
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CERTIFICATE OF SERVICE

I, GEORGE R. GEORGIEFF, *Counsel for Respondent*, and a member of the Bar of the United States, hereby certify that on the ____ day of April, 1980, I served copies of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari on Murray M. Wadsworth, Esq., and William Howard Davis, Esq., of Thompson, Wadsworth, Messer and Rhodes, at Post Office Box 1876, Tallahassee, Florida 32302, *Counsel for Petitioner*, by a duly addressed envelope with postage prepaid.

GEORGE R. GEORGIEFF
Assistant Attorney
General

A P P E N D I X

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA.

STATE OF FLORIDA,	:	
Plaintiff,	:	
vs.	:	CASE NO. 78-83
MIGUEL ANGEL MORA,	:	
Defendant.	:	

FILED
MAR 17 3 57 PM 1978
PAUL F. ... JR.
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA.

DEPOSITION OF:	DOUGLAS L. ADAMS
TAKEN AT THE INSTANCE OF:	The Defendant
DATE:	Monday, March 6, 1978
TIME:	Commenced at 9:45 A.M. Terminated at 10:00 A.M.
PLACE:	Suite 608 Lewis State Bank Building Tallahassee, Florida
REPORTED BY:	SANDRA L. DiBENEDETTO, CSR, RPR Notary Public in and for the State of Florida at Large.

* * *

APPEARANCES:

Representing the Plaintiff:

WILLIAM N. MEGGS, Esquire
Assistant State Attorney
Post Office Box 1841
Tallahassee, Florida 32302

Representing the Defendant:

MURRAY M. WADSWORTH, Esquire

-and-

WILLIAM H. DAVIS, Esquire

Thompson, Wadsworth, Messer,
Turner & Rhodes
Post Office Box 1876
Tallahassee, Florida 32302

* * *

I N D E X

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* * *

S T I P U L A T I O N

The deposition of DOUGLAS L. ADAMS, taken at the instance of the Defendant, on oral examination, pursuant to Notice, commenced at 9:45 A.M., on Monday, March 6, 1978, at Suite 608, Lewis State Bank Building, Tallahassee, Florida.

I HEREBY CERTIFY that this deposition was taken for the purpose of discovery, for use as evidence and for such other uses and purposes as may be permitted by the Florida Rules of Criminal Procedure and other applicable law; that the reading and signing of same by the witness is hereby waived; that all objections except as to the form of the question are reserved until the trial of this cause, and notice of filing said deposition is waived.

TAKEN BEFORE Sandra L. DiBenedetto, Certified Shorthand Reporter and Notary Public in the State of Florida at Large.

* * *

Thereupon,

DOUGLAS L. ADAMS,

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

Q Mr. Adams, my name is Bill Davis. This is Murray Wadsworth, and we represent Miguel Mora in this case. Would you state your name for the record.

A Douglas L. Adams.

Q And your occupation?

A I work with Eastern Airlines as an agent.

Q Are you familiar with the matter that we are here on today?

A Yes.

Q Could you just briefly tell us everything you know about it?

MR. MEGGS: Before you do, I am William Meggs and I represent the State.

THE WITNESS: Okay. Supervisor Pate told me before as I came on duty that afternoon to be on the lookout for Mr. Mora's bag since it had been missing since 10:00 o'clock that morning, I guess. And we were in the process of looking for it. And the bag came in the afternoon late. The tag on the bag did not match the tag on the tracer we had initiated. So, I called Mr. Mora and asked for a list of contents and if he minded if we would take a look at the bag to make sure it was his.

And when he gave a list of contents, I then opened the bag and found quite a number of pills and a little marijuana in there, plus the items that he had mentioned that were in the bag.

And Mr. Pate told me that Mr. Mora had told him

that he was under a doctor's care and there was some prescription medicine in the bag. But the pills or capsules that were in there were in a little plastic bag like you might put a sandwich in. And so, I called Officer Smith. There was marijuana in there as well. And he came over and looked at it, and he didn't know what it was. So, he called the narcotics man, which I guess was Officer Huffman, which he came out and looked at it and asked us if there was any way that we could ask this Mr. Mora to pick up his bag.

We told him we were obligated to deliver it, that it was company policy. And Mr. Pate then called Mr. Mora and told him we would deliver the bag that we had in our possession and that it would be 30 to 40 minutes before we could get it to him. And he said, "Hold it and I will come pick it up."

So, when I started out of the office to go to the coffee shop, someone walked up to the counter. And I asked him if I could help him and he produced himself as Mr. Mora and said he was looking for a bag. So, I went back inside and got his bag and sat it down on the counter.

He opened up the bag and said it was his and walked away from the counter. And I walked inside, and that was the last I saw of it.

BY MR. DAVIS:

Q When Mr. Pate asked you to look out for Mora's bag, did he describe it to you? How did you know it was his bag when it got there?

A We didn't. That's the reason I asked for the list of contents so that I could verify that it was his bag. It fit the description by color and by what we call type. But there was no identification on the outside of the bag and the tag on the bag was not the same one that he had given us.

Q How did it get to Tallahassee?

A By a circulous route. I understand Miami loaded it on a wrong flight because he was late checking in. And the best we could determine by the flight number was it went to New York and came back to Tallahassee.

Q And how do you think it finally made it to Tallahassee in the end? How was it sent here?

A It was sent back by what they call an expedite number. The original tag on it might have read Tallahassee, I don't know. But the original tag was not on it when it got back to Tallahassee.

Q And the people in New York identified it as belonging to Tallahassee somehow?

A Evidently by the tag number that was on it because, like I say, there was no identification on the outside of the bag.

Q Were you there when Mike Mora called and kept insisting, demanding his bag?

A Well, he called. I think I talked to him personally maybe three times that afternoon. He wanted his bag back.

Q And did Mr. Pate talk to him?

A That morning I understand he did, yes.

Q Was he rude to you?

A No. He was very insistent, but he wasn't rude, not to me.

Q Were you curious as to what was in the bag or why he was so insistent?

A No. I had no reason to be other than the fact that Mr. Pate said he had prescription medicine in there, which I didn't see.

Q What description of contents did Mr. Mora give to you?

A He listed or said that there were a couple of pullover sweaters or shirts. And I think he said maybe a couple of other shirts in there. But he did not mention the fact that there was a leather jacket on top and he didn't mention any prescription medicine or drugs or anything else. Of course, he wouldn't have, I guess.

Q When you opened the bag, did you see the sweaters?

A No, they were under the coat, the leather coat

which was on top. So, I had to lift the coat up and see what was under it.

Q And the sweaters that he described were there right underneath the coat?

A Yes, sir.

Q And the baggies were underneath the sweaters?

A No, they were in the back of the bag underneath the coat.

Q Underneath the coat. After you found the baggies, what did you do then in a little more detail?

A Well, I called Officer Smith to ask him if there was any way he could identify what it was. It wasn't prescription medicine and it was not in a prescription bottle of any kind. And there was a very large number of them.

Q And he said he didn't know what it was?

A Right.

Q The same with the other baggy; he wanted to call in a vice squad officer?

A Right.

Q So, after Officer Smith left, did you zip up the bag and wait for this other agent to arrive?

A We put it in what used to be the supervisor's room, yes.

Q What happened then when this other officer arrived; Officer Huffman, is that correct?

A I don't know what his name is. I just know he arrived. He asked to look at the contents of the bag, and I just opened the bag and he made his examination.

Q You unzipped the bag and opened it?

A Yes.

Q Had you repacked the bag pretty much the way it was?

A I didn't mess with it any way. I just lifted up the coat and maybe the edge of the sweaters. That's all.

Q So then Officer Huffman lifted up the coat and saw the drugs there?

A Right.

Q Okay.

A Well, he just moved it aside.

Q What did you tell Officer Huffman when he arrived?

A I just told him the bag belonged to a person that had filed a tracer on it, that it was missing, and we had it back in there.

Q Did you hear Officer Smith tell Officer Huffman anything about the bag?

A No.

Q Was Officer Smith there when the second officer came in?

A I believe he was.I think they came in together. I'm not sure. I was working for paper operations and answering

the phone and checking customers in and out.

Q Did you hear Officer Smith say, "There's something in there I want you to identify, or maybe you can tell what it is," or anything like that?

A No, sir, I didn't.

Q You said that your normal practice was to deliver the bag once you identified it, and that Officer Huffman asked you not to do that?

A Yes.

Q Did he tell you --

A Or he asked the supervisor, Mr. Pate. And Mr. Pate responded in the manner that it was company procedure that we are obligated to deliver the bag because it was misplaced by Eastern Airlines.

DIRECT EXAMINATION

BY MR. WADSWORTH:

Q I would just like to ask a couple of questions that I think probably have been covered, but to make sure I'm clear.

When you looked in the bag, you saw something, the items you described, that caused you to be suspicious. And so, you called -- contacted Officer Smith and asked him to come look -- contacted or notified him. That's your obligation, I assume?

A Right.

Q And he asked you to show him whatever it was you were talking about?

A Yes.

Q And you took him in and showed it to him?

A Well, the bag was opened when he came in. I just called him over the paging system.

Q At any rate, he came and looked, and he didn't know what it was either. So, he said he would call a vice squad officer and see if they could get an idea of what it was?

A Yes.

Q So, he called and Officer Huffman is the one who responded to that call?

A Yes. I don't know what his name was, like I say.

Q Okay. And so, when Officer Huffman arrived, Mr. Smith was either there or I think you said he may have arrived with him?

A I believe they came in together. I'm not really sure because that happened some time ago.

Q Okay. But at any rate, Smith was present when Officer Huffman arrived?

A Yes, he was.

Q And Officer Huffman asked to be shown what it was that you were talking about, and the bag was opened and he was shown the same thing that Smith had been shown?

A Yes.

Q Did Officer Huffman then indicate in your presence what he thought it was?

A No, sir.

Q Did he ask you to hold the bag for a period of time? Was there any conversation? Did he make any requests about holding the bag or anything of that nature?

A Well, he asked us to hold it if we could and ask Mr. Mora to pick it up, but we told him we can't, that it was not company policy.

Q Did he ask you to just hold it indefinitely, for instance, while he obtained a search warrant or anything? Was there any discussion of that nature?

A No.

Q Wouldn't have been any problem doing that, would there?

A Holding it?

Q Yes, sir. You could have just held it for an hour or two, could you not?

A Yes, but we -- the bag had been missing since 10:00 o'clock that morning and, you know, we try to get it to them as soon as we can once it's found.

Q Sure. I understand. But Mr. Mora was not standing there and demanding it, or anything like that?

A No.

Q You all, in fact, after talking with Officer

Huffman, you all called Mr. Mora at home and told him you had the bag; is that right?

A Yes.

Q And Officer Huffman was there when that call was made?

A I believe so, yes.

Q And then it was just a matter of waiting for Mr. Mora to come out there and pick up -- claim his bag?

A Right.

Q Had you ever seen any pills just like this before to your knowledge?

A No.

Q Had you ever seen anything that was known by you to be marijuana before?

A Yes.

Q When was that?

A When I worked in Atlanta, Georgia, in the baggage service department, and through the FEI and narcotics agent, I had seen some up there.

Q You seen some there that you had been told was marijuana?

A Yes.

Q And was identified as marijuana?

A Yes.

Q But you never worked in police work or vice work

or been trained in that area?

A No, sir.

Q And so, you didn't know what it was either then?

A Well, I had --

Q It was a matter of suspicion?

A Like I say, I had seen it in Atlanta and smelled it, you know, and it was the same. I am not that familiar with marijuana, no.

MR. WADSWORTH: Right. I don't have any further questions.

MR. MEGGS: Nothing from the State.

(Whereupon, the deposition was concluded at 10:00 A.M.)

* * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA)
:
COUNTY OF LEON)

I, SANDRA L. DiBENEDETTO, Certified Shorthand Reporter and Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing deposition was taken before me at the time and place therein designated; that before testimony was taken the deponent was by me duly sworn; that my shorthand notes were thereafter reduced to typewriting under my supervision; and the foregoing pages numbered 1 through 14 are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the 14th day of March, A. D., 1978, IN THE CITY OF TALLAHASSEE, COUNTY OF LEON, STATE OF FLORIDA.

Sandra L. DiBenedetto, CSR

SANDRA L. DiBENEDETTO, CSR, RPR
Suite 608, Lewis State Bank Building
Tallahassee, Florida 32301

My Commission expires: February 20, 1982.

* * *